

**Model Clauses For Track Access Agreements:
Access Rights and Moderation of Competition**

Railtrack's Response

July 2001

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1. Summary

- 1.1 We agree with the Regulator's objective of providing clear, unambiguous contracts which will allow the industry to respond to future growth. There are, however, some areas where we still find difficulty with the Regulator's proposals in relation to the templating of Schedule 5. Most notably those proposals in respect of journey time protection. We believe that our obligation should be to provide an end to end journey time based on the sum of Sectional Running Times. This, when coupled with our obligation to operate the Access Condition D processes in a fair and even-handed way and the opportunity for operators to appeal to the Regulator, provides sufficient protection for train operators.
- 1.2 We are concerned that the Regulator's proposals to specify a large number of service characteristics will operate heavily against the public interest and will constrain growth of services and passenger traffic. We can understand why operators might support such an approach, but are concerned that an inflexible Schedule 5 could be used as a ransom strip to block applications for new rights and opportunities to enhance the network.
- 1.3 We are also concerned that we may be expected to balance an operator's commercial case for, by way of example, hardwired platform rights, against the detrimental impact the granting of such rights may have on network capacity. We do not believe that we are in a position to make such judgements, without the use of objective criteria from the Regulator.
- 1.4 Nevertheless, there are some areas where we believe the Regulator's objectives can be accomplished through a framework of simplified template bilateral contracts, coupled with the multilateral Network Code. Hence in areas such as journey time protection and access rights hard wiring:
- **bilateral** contractual obligations to provide capacity, which would persist for the (potentially lengthy) lives of franchise and enhancement access agreements, would be focused on quantum rights, permitted flex and infrastructure and train capability (expressed through Sectional Running Times). These would reflect the parties' **bilateral commercial** agreements (subject to Regulatory approval); while
 - the evolving impacts of network development and overall utilisation on individual train timings can continue to be resolved in the **public interest** through the processes and Decision Criteria set out in the **multilateral** Network Code. The relevant change processes, to which all the bilateral commercial agreements would continue to be subject, include the annual processes for updating the Rules of the Route and Plan, and the investment-led processes of Vehicle and Network Change.
- 1.5 We have therefore made a series of simplifying proposals in our response aimed at providing operators with firm contractual rights, while allowing the longer term development and optimisation of network capacity to be managed in the public interest via the Network Code.
- 1.6 In addition, we have suggested that some of the Regulator's proposals for template model clauses in fact reflect potential commercial requirements for only some

types of service - and that "customisation" of a simpler template would impose fewer constraints and hence offer the industry more scope to optimise the use of scarce capacity via negotiation of bespoke changes to the template.

- 1.7 Similarly, we believe that the Regulator's objectives in respect of Moderation of Competition through the access contract framework can be achieved more effectively and at lower cost through a simpler alternative to his proposed mechanism. The proposed mechanism which is based on protecting thousands of individual specified flows, would be difficult to define and would require the industry to incur significant additional administration costs. It would also require the Regulator to anticipate the extent to which these flows might continue to relate to evolving transport markets many years in the future, at a time when the SRA's franchise renewal strategy is still under review.

Abstractive entry is likely to be the only type of entry that could afford the high revenue hurdle required by Access Protection Payments. This would allow entry to occur in exactly the opposite areas to what we believe should be the Regulator's policy aims. We suggest that, instead, the Regulator focuses on publishing policy guidelines in respect to future open access applications, so that flow protection in line with this policy can then be effected when any open access applications are made.

- 1.8 The Regulator's latest document provides an important element of his emerging proposals for the industry contractual framework - but in a number of areas the linkages and dependencies with other evolving proposals make a full assessment difficult at this stage. For example the commercial impact of the Regulator's Schedule 5 proposals will be affected by his proposed new liability regime, while the impact of any first and last train access rights on the new possessions incentive regimes will be affected by the Regulator's Schedule 4 and Condition G proposals. We therefore welcome the Regulator's proposal to prepare draft conclusions on model clauses for consultation as well as updated criteria for approval of access agreements in the autumn before they are each finalised.

Confidentiality

- 1.9 We are happy for the entirety of this response to be published by the Regulator.

2. Access Rights Definition in Schedule 5

Introduction

- 2.1 As we have stated in previous responses, we welcome the concept of harmonised access rights set out in a simple tabular form. It is in the interests of all industry players to have a clear and unambiguous understanding of what access rights have been sold at any time. We do question, however, whether the template as proposed will work well for those operators who operate a large number of service groups on many different parts of the network, for example Central Trains.

Journey Time Regime

- 2.2 To assist with a better understanding of the contractual arrangements, we welcome the principle that all provisions relating to access rights should be brought together under Schedule 5, provided the relevant provisions do not co-exist within more than one part of the contract. We do have some specific comments in relation to the journey time provisions in Schedule 4.

Other firm rights

- 2.3 We recognise that a few existing operators enjoy firm rights to use specific platforms. We believe that this should be the exception rather than the norm, and we consider that only in the most exceptional circumstances can a case be made for a train operator to be given a firm contractual right to use specific platforms. Even then, this case would need to be balanced against the detrimental impact on capacity of the network. An operator should be able to demonstrate that a right to use specific platforms would have a negligible adverse impact on capacity and performance, and that it constitutes either a significant operational benefit or represents a significant driver of revenue. One way to assist might be for the Regulator to publish specific criteria to which we and the train operators could have regard when deciding whether or not a firm right to a particular platform is justified.
- 2.4 The contents of Chapter 2 of the consultation paper do not appear to be consistent with the draft template Schedule 5, therefore it is not clear what the Regulator means by “hardwired departure times”. It is assumed that the Regulator is referring to clockface departures with flex, rather than fixed departure times with no flex. The latter gives rise to a significant constraint on development of a timetable and excessive consumption of capacity. This seems to be out of all proportion to the benefits to the recipient train operator. However, we accept that operators may seek some degree of regularity in their departure times from origin, and would support this provided that the provisions give Railtrack a sufficient amount of flex to balance the competing demands on the timetable.
- 2.5 A general issue is that the more characteristics of a “Train Slot” that are specified in Schedule 5, the more inflexible the schedule becomes. This lack of flexibility increases the cost to the industry of negotiating supplemental agreements to introduce new or adjusted access rights around that inflexibility and increases the opportunities for incumbent operators to exploit these rights as ransom strips, either to obtain compensation for contractual adjustments, or to prevent the introduction of additional services. We believe it is in the best interests of the

railway industry to reduce transactions costs and complexity as far as possible, therefore, the less unnecessary detail that Schedule 5 contains the better.

Rules of Route and Rules of the Plan

- 2.6 We endorse the statement (which follows from the way Part D of the Access Conditions interfaces with Schedule 5) that Schedule 5 rights are subject to the Rules of the Route and Rules of the Plan, and suggest for clarity that a statement to that effect should form part of the new template Schedule 5. Our comments on the proposed new Schedule 5, including those relating to Rules of the Route/Rules of the Plan, accompany and form part of this response.

Consultation responses

Pathing Time Caps

- 2.7 Although we note that, in the present round of consultation, the Regulator is not proposing the concept of pathing time caps per se (but rather a maximum journey time inclusive of all allowances, including pathing time), we feel it will be useful to set out again our position on this issue.
- 2.8 We have argued against a cap on pathing time. The concerns of ATOC are noted, but we would restate the point that the insertion of pathing time is only necessary where operators submit conflicting bids. We have no right to insert pathing time except to resolve a conflict between competing train slots, and even where pathing time is inserted, there is a right of appeal ultimately to the Regulator. Pathing time is **only** inserted into a train slot as a result of one or more operators requiring train slots which, without the insertion of pathing time, would conflict with the Rules of the Plan. Examples of this would include conflict with Rules of the Plan headways or junction margins.
- 2.9 In our view, constraints on the legitimate insertion of pathing time constitute a serious restriction on the accommodation of additional or varied services and thus on the development of the timetable in the public interest. We consider that such caps protect incumbent operators from competition from new services, and we continue to be surprised at the Regulator's willingness to contemplate such constraints (albeit in the form of inclusive journey times) which, in our view, inevitably work against the public interest.
- 2.10 Any arbitrary cap on pathing time applied across the board would make the balancing of competing demands on the timetable very difficult, particularly one as low as 4-5%. This is particularly so at a time when the industry is experiencing growth on the network and, as a result, the network is being changed through enhancement schemes and operators are seeking new and, in some cases, substantially adjusted access rights. The current situation is that it is impossible to forecast what access rights may be sought by industry participants in the future. This makes it impossible to judge today in terms of pathing time caps what may, in the public interest, be appropriate in the future.
- 2.11 We believe that the presence of a pathing time cap gives operators who may be affected by future enhancement schemes what could effectively amount to a "ransom strip". An operator could block the introduction of new services by

insisting on the retention of, or placing an unreasonably high value on, existing journey time protection. This would have the effect of inflating the cost of such enhancements and operate against the public interest.

- 2.12 We welcome the strong support shown by the SRA for reliance to be placed on the Part D decision making process, based on the Decision Criteria (with its appeal process) rather than on imposing what may turn out to be arbitrary and inflexible pathing time caps.

Loss of firm rights

- 2.13 We support the way in which the Regulator proposes to allay ATOC's concerns to exercise firm rights as to interval or clockfacing if the regular calling pattern is varied by the removal of one or more regular stations. This protection is provided for in paragraph 4.2 of the template Schedule 5. In respect of rolling stock we refer to our comments below concerning changes in the characteristics of specified equipment.

Other firm rights

- 2.14 The number of disputes that have arisen from the application of the Decision Criteria have been very few and in our opinion this reflects the effective operation of the Part D process. We believe that ATOC should place more reliance on the Decision Criteria which are part of a process overseen ultimately by the Regulator. The Regulator may wish to consider what changes, if any, are required to the Decision Criteria so that operators (and ATOC) are prepared to place more reliance on the contractual protection afforded by Part D of the Access Conditions. In passing, we do not understand how firm rights to such issues as stabling and turn-round times are "integral to journey time protection".

Regulator's revised approach

- 2.15 We agree that a template Schedule 5, when applied in conjunction with the Access Conditions, should represent a balance of the factors set out in paragraph 2.12 of the Regulator's document.

Maximum journey time

- 2.16 We have serious concerns about the Regulator's proposal on maximum journey times, where those times are to be inclusive of all allowances including pathing time. We still strongly favour the approach where Schedule 5 expresses journey times as a sum of the relevant Sectional Running Times ("SRTs") which are exclusive of pathing time and other allowances. If during the Access Condition D timetable development process a train operator believes that insertion of pathing time has not been carried out by Railtrack in a fair and even-handed way or is not in the public interest, it could appeal ultimately to the Regulator for a determination.

- 2.17 Similar to the point made in respect of pathing time caps, a right to a maximum, all inclusive, journey time gives incumbent operators what could amount to a “ransom strip” in respect of future enhancement of the network. If so, the cost of such enhancements will be increased and thus operate against the public interest
- 2.18 We do not presently have the computer-based tools by which we would be able to sell rights to maximum journey times (inclusive of all allowances) and be certain, in each and every case, that these rights could be delivered. This means that we would still need to undertake the manual train planning processes to ensure that capacity exists when assessing applications for new rights. This is a time consuming and labour intensive process.
- 2.19 The amount of scenario testing that can be undertaken using manual train planning techniques is very limited. It becomes even more difficult to assess the viability of new rights when an operator enjoys hard-wired rights (for example a maximum journey time inclusive of pathing time and other allowances) but does not use them. To ensure that we do not oversell, we would have to produce two timetables; one where the hard-wired rights are unused; and one where they are assumed to be taken up. This is clearly an inefficient and resource hungry way to develop new timetables. This is not done at present, and to start doing so to protect Railtrack’s commercial interests would consume unnecessary and disproportionate resource. We believe that the right answer for the industry is to ensure that there is no gap between rights exercised and the rights held but not exercised at the present time. We refer again to this issue in our response to Chapter 3.
- 2.20 Franchise replacement and other initiatives will bring about significant re-casting of timetables. This will make the assessment of new applications even more complex as there will be no fixed base against which the new rights can be tested. The implication of this is that, were the Regulator’s proposal or something similar to be adopted, we could only accept applications for new rights where it is absolutely indisputable that they can be accommodated on the network. Where there is any doubt we would be forced to either reject the application or require the inclusive journey times to be extended significantly to ensure that it can be delivered.
- 2.21 The Regulator’s proposals effectively mean that those operators who apply first get the most advantageous rights with all others having to be ‘shoe-horned’ around them. This clearly would not allow the timetable to be developed over time in accordance with the public interest. The principal losers in this situation would be those train operators and their customers who end up having to accept sub-optimal access rights simply as a result of being “last on the graph”. This could create a significant barrier to entry for new services.
- 2.22 Furthermore the Regulator’s proposal would significantly reduce the extent to which the timetable could subsequently change in response to environmental and market changes. Once a small number of train operators have quantum, frequency, journey time and potentially other elements of their rights effectively hard-wired into the timetable, that timetable becomes effectively frozen for the future.

- 2.23 We support the proposition, where changes are made to the Rules of the Route / Rules of the Plan which, if implemented, would increase journey times, that:
- (a) there is and should continue to be a formal consultation process to be undertaken (with a right of appeal ultimately to the Regulator) before these changes can be implemented; and
 - (b) this formal process gives operators adequate protection over alleged “journey time creep”.

Key journeys

- 2.24 We acknowledge that Schedule 4 currently contains tables for the purpose described in paragraph 2.20 of the Regulator’s proposals. Furthermore, we accept that in general we have a responsibility, as a minimum, to maintain the current functionality of the network. There are however circumstances where Rules of the Route and Rules of the Plan need to be changed because of events outside our control, such as changes to Group Standards or safety legislation, or indeed to accommodate a TOC proposed Network Change.
- 2.25 A further example of a circumstance entirely outside our control is an increase in patronage of a particular group of services which render existing Rules of the Plan station dwell times unachievable. As currently proposed by the Regulator, we could only effect a change to these dwell times through negotiating a change to the access agreement. If a train operator were to refuse to agree such changes, we would have unrealistic Rules of the Plan with a timetable that is not robust and which would lead to performance unreliability.
- 2.26 We do not believe that having a maximum key journey time (inclusive of pathing time and other allowances) is necessary to provide the protection against network degradation that the Regulator is seeking. It seems from the Regulator’s document that he would expect the Fastest Key Journey Time (i.e. Table 6.2) to include pathing time. This being the case, the achievement of the Key Journey Time will not necessarily indicate that the current functionality of the network has been maintained i.e. in theory, Railtrack *could* potentially remove some (or insert less) pathing time in order to compensate for the impact of degradation on network functionality.
- 2.27 In relation to the addition of allowances we consider that, were Railtrack to propose additional allowances to compensate for the impact of degradation to network functionality, operators can seek adequate protection through the Part D consultation and appeal process applicable to changes to the Rules of the Route/Rules of the Plan – that is the correct place to determine whether or not it is a legitimate addition. As set out below, we consider that protection against increases in end-to-end journey times based on the sum of SRTs should be sufficient. We believe that the Regulator’s proposals go further than this and could potentially protect operators against events that should legitimately lead to changes in journey times.
- 2.28 For the reasons outlined above, we do not agree with the proposal set out in Tables 6.2 and 6.3 and therefore would not wish to see it in either Schedule 4 or Schedule 5.

2.29 In respect of the second part of paragraph 2.22 of the Regulator’s document it is very difficult to comment on the principles and detail of what is contained in Schedule 5 before we have an understanding of the Regulator’s final conclusions on how the new liability regime will impact on existing agreements.

New journey time architecture

2.30 We consider that train operators need the following protection in relation to journey times:

- (a) end to end journey times based on the sum of SRTs (exclusive of pathing time and other allowances) to be contained within a table in Schedule 5, with the process for change in those journey times contained in Part D of the Access Conditions; and
- (b) contractual comfort (which already exists) that we will operate the Access Condition D processes, including the application of the Decision Criteria, in a fair and even handed way.

For clarity, we set out in Appendix A to this response how a journey time is built up and describe the protection which would be available if the above principle is accepted.

2.31 We believe that the level of protection outlined in the above paragraph is sufficient to eliminate the need for Tables 6.1, 6.2 and 6.3. In their place should be a table which sets out end to end journey times (with a defined calling pattern) based on the Sectional Running Times relevant to each class of rolling stock operated by the relevant train operator. Should operators believe that they are not provided with adequate protection through the processes described in Appendix A, they should make clear their particular concerns when the Regulator consults on the Network Code.

2.32 Paragraph 2.24 of the Regulator’s proposals illustrates why we have such difficulty with the concept proposed by the Regulator. The implication that the journey times will be subject to negotiation based on journey times currently achieved in practice, demonstrates the difficulty that will arise when there are substantial changes to the network and to operator’s train services. This will be exacerbated on congested, multi-operator routes. In addition, and taking as a basis the make-up of a typical journey time discussed in Appendix A , we note the statement that “an operator may wish to negotiate maximum journey times for all or most of its services”. We would like to understand which aspects of a typical journey time the Regulator considers are negotiable. Given our comments above, we do not understand why Tables 6.2 and 6.3 are necessary.

2.33 Regarding the question whether or not degradation of the network could be better dealt with under the general liability provisions, we have no particular preference as to where such provisions should be located in any track access agreement. However, it is very difficult to comment on the principles and detail of what is contained in Schedule 5 before we have an understanding of the Regulator’s final conclusions on how the new liability regime will impact on existing agreements.

- 2.34 Before we agree to the sale of a train path we need to have absolute certainty that the path exists. Without absolute certainty there is a risk that the path sold may be incapable of delivery. Logically, the way to eliminate this risk is through **all** rights being absolutely hard-wired. That way, we and train operators would know exactly what capacity has been sold at any time. Furthermore it would allow us to know exactly what additional space exists for use by other services. We have not argued for this because we believe from a public interest perspective that it is not the right solution. We consider that the timetable must be allowed to develop in the future to respond to changes in environmental and market conditions.
- 2.35 To move away from the concept of hard-wiring increases the risk of capacity being oversold and reduces the ability for industry supply to increase (and for Railtrack to grow its business) through sales of additional paths. This risk is only removed (or largely removed) with the move to absolute flexibility i.e. train paths are determined by the Access Condition D process alone. Again, we have not argued for this as we know it is not a practical option and that train operators need some certainty to allow them to plan their business and protect investment.
- 2.36 Our proposal that two elements be specified in Schedule 5 (i.e. quantum and frequency) and all other elements remain subject to Access Condition D processes represents the most appropriate balance between absolute hard-wiring and absolute flexibility.
- 2.37 Operators' need for sufficient certainty to plan their businesses would be achieved by the above proposal, together with the general consultation and appeal processes (and in certain cases, rights to financial compensation) currently contained within Part(s) D (F and G) of the Access Conditions. Sufficient flexibility is also required to allow the network to grow in order to accommodate the growth in passenger numbers currently being experienced. We are concerned that a preponderance of overly specified contractual rights across the network will constrain our flexibility to respond to those demands and may give operators a financial incentive to unreasonably oppose development of the network as an opportunity to receive compensation which, by definition, adds to the cost of enhancing the network.

Loss of firm rights

- 2.38 We agree with the Regulator's response to ATOC's suggestions in paragraphs 2.28 and 2.29 of his document.
- 2.39 We support the Regulator's proposals in paragraph 4.3 of the template, but would point out that pathing time would only be inserted in these circumstances where not to do so would give rise to a breach of the Rules of the Plan.
- 2.40 In relation to equipment changes, the Regulator states "*Nor will change of equipment make other rights inapplicable if that equipment is capable of performance at least equivalent to equipment originally specified.*" While accepting this principle, we believe that the protection required is that the new equipment should have characteristics **and** be capable of performance, in each case, at least equivalent to the equipment originally specified. The reasons for this are for example that train length and gauge may affect such things as our ability to platform a train with the resultant impact on capacity, and door width and internal

train layout might impact dwell times and performance. With reference to paragraph 2.31 of the Regulator's document, we accept the need for some flexibility but consider that each case should be considered on its own merits.

Intervals and clockface departures

- 2.41 We accept the desirability of having a degree of certainty over the regularity of services. We note the proposal to incorporate tables catering for both regular intervals and clockface departures. However, in the light of the terms of paragraph 3.3(a) of the template, it is not readily apparent how the approach adopted in paragraph 3.1 of the template differs from that set out in paragraphs 3.2 and 3.3. Furthermore, we would not consider it appropriate for both "tables" to be included in any one operator's contract, and as the Regulator himself suggests, Table 3.1 is more likely to be found in a "metro style commuter service" operator's contract, whereas Table 3.2 would more commonly be located in the Schedule 5 of an intercity operator. We believe that these should be either/or options. This is the implication of the wording of paragraph 2.34 of the Regulator's document, but it would be helpful if this was made explicit.
- 2.42 We recognise and support the need for flex on interval pattern and departure times. Although noting the Regulator's suggestion that the degree of flex might not exceed the headway, in seeking to optimise the timetable there may be circumstances where the degree of flex should exceed the headway.
- 2.43 Whilst recognising, from the operator's perspective, the desirability in some instances of combining services in the way suggested by the Regulator (and by combining services we take this to mean services within different service groups) our experience of negotiating such arrangements (most recently in relation to the CrossCountry upgrade) indicates that this is far more complex than could be easily catered for within a set of model clauses. Experience has shown that any such arrangement would need to be subject to a large number of caveats, conditions and exceptions. We therefore believe the option should not be part of the standard template.

First and last trains

- 2.44 Whilst it is not referred to in the main text of the consultation, we note the inclusion of Table 3.3 and the operative provisions of paragraph 3.4 of the template.
- 2.45 We do not believe that first and last trains should be included in a table of firm rights. The two key objectives of the Schedule 4 incentive regime are to incentivise efficient planning and to strike the economically optimum balance between engineering possessions and traffic. To anticipate the outcome in advance by fixing first and last trains without reference to the workings of the Schedule 4 incentive regime would frustrate the overall intention of the Regulator's incentive proposals.

Other firm rights

- 2.46 We would mention again that the more characteristics attributed to a "Train Slot" in Schedule 5, the more inflexible the schedule becomes and hence the greater the cost incurred by the industry in negotiating supplemental agreements to introduce

new or adjusted access rights “around” that inflexibility. The last sentence of paragraph 2.36 is a helpful indicator of the criteria to be applied. In most cases, however, Railtrack would be unable to demonstrate that the hard-wiring of other rights does not create an undue constraint on the exercise of its flexing rights.

Platform Rights

2.47 We can think of few (if any) circumstances in which rights to specific platforms would not create an undue constraint on the exercise of Railtrack’s flexing rights or its ability to accommodate new access rights. For example, Gatwick Express have rights to designated platforms at Gatwick Airport Station and London Victoria Station. In the case of Gatwick Airport, whenever two Gatwick Express trains are at the station simultaneously (and this happens for 5 minutes in every 15 in the standard hour), a Gatwick Express train effectively blocks the up slow on the Brighton main line.

2.48 In the light of statements made by this Regulator on this issue, we are surprised to see this particular issue being dealt with in a template Schedule 5, being a schedule which we had understood might apply “across the board”. We do not believe that we are in a position to determine whether the commercial justification put forward by the operator is sufficient to counter the disbenefit in terms of capacity consumption. Before we are able to make a judgement as to whether the commercial justification outweighs the capacity impact, we believe the Regulator should produce objective criteria. Without such criteria, we would find it difficult to envisage including such a right in any Section 18 or Section 22 application.

Connections (Table 8.2)

2.49 Whilst recognising the public interest desirability of maintaining connections between some services, we are not convinced that specific terms need to be included within the template since:

- (a) “maintaining and improving connections between railway passenger services” is one aspect of the Decision Criteria to which we must have regard in timetabling services; and
- (b) minimum connection times are provided for in the Rules of the Plan.

Accordingly, connections are adequately catered for in Part D of the Access Conditions and the Rules of the Plan.

2.50 A firm right to connections, coupled with a firm right to, say, a journey time and turnaround time would cause considerable constraints on timetabling flexibility, since an up-service that enjoyed those rights would effectively dictate the service characteristics of the down-service. The consequence of this is that decisions made for the first service of the day will have repercussions on timetabling flexibility throughout the rest of the day.

Departure time ranges (Table 8.3)

2.51 We do not fully understand what Table 8.3 is trying to achieve or in what circumstances it might be used. We would welcome a clearer explanation of how

Table 8.3 is to work alongside, or in substitution for, Tables 3.1 (Service Intervals) and 3.2 (Clockface Departures). It seems at first sight to be a substantial restraint on the efficient planning of a timetable and to duplicate parts of Table 3.1 and 3.2. We would welcome an explicit statement that in no circumstances should an operator be protected by more than one of Tables 3.1, 3.2 and 8.3.

Stabling facilities (Table 8.4)

- 2.52 We believe that operators should work towards stabling all trains off the network. However, we recognise that for a number of operators this is not feasible and accordingly there may be circumstances where firm rights to stabling will be required at certain locations and at specific hours of the day/night. It is essential to know the number of vehicles and their respective lengths for which there is a right to stable. We do believe however, that further stabling on the network would cause significant capacity constraints, and would frustrate maintenance and renewal activity. Where operators are seeking to introduce additional vehicles to their fleet we believe that they should be required to procure an equivalent amount of stabling facility off the network.
- 2.53 Given the extent of work envisaged on the network, we believe that we should be able to plan engineering work notwithstanding stabling rights. For this reason, we consider that stabling rights should be in the nature of a “right to bid”.

Turnaround times (Table 8.5)

- 2.54 Clearly, any rights to extend turnaround times beyond those laid down in the Rules of the Plan will consume additional capacity on the Network. We do not believe that we are in a position to determine whether the commercial justification put forward by the operator is sufficient to counter the disbenefit in terms of capacity consumption. Similar to our comments under Platform rights, before we are able to make a judgement as to whether the commercial justification outweighs the capacity impact, we believe the Regulator should produce objective criteria.

Terminology

- 2.55 We support the inclusion in the draft template of the concept of a “right to bid”. Amongst its advantages, this should assist in reducing the number of supplemental agreements that might otherwise be required.

Rules of the Route and Rules of the Plan

- 2.56 We support the statement that all rights in Schedule 5 are subject to the Rules of the Route and Rules of the Plan. We have set out our position in relation to Tables 6.2 and 6.3 above.

Other changes to September 2000 documents

- 2.57 Our comments on the template Schedule 5 are shown on the accompanying mark up and form part of our response. In relation to the items listed in paragraph 2.45 of the Regulator’s document, most of these do not appear to justify inclusion in a template Schedule 5 which we had understood was to apply “across the board”. A number of the items may be included in a limited number of operator’s contracts,

but these should be incorporated as bespoke arrangements and after appropriate discussion between Railtrack and the given operator and not, in our judgement, as part of a general template Schedule 5.

2.58 Subject to that:

- Terminating/commencing short – if services are to commence or terminate short, this should not result in the operator exceeding the station dwell time at the relevant station and will be subject to there being a path to or from that particular station. We believe that this would be best served by the right being expressed in the nature of a “right to bid”.
- Through services – the combining of Train Slots can consume a significant amount of capacity on the network and can have an extremely detrimental impact on performance. We do not believe that the wording suggested by the Regulator at paragraph 2.3 of the template gives sufficient flexibility. The combining of Train Slots to make through services requires, by definition, the use of through platforms. This may be where previously the two services combined used bay platforms. Through services by their nature reduce performance reliability. Railtrack does not consider that operators should be placed in a position whereby they are able to require from Railtrack something that will give rise to a deterioration in performance on the network. Therefore we propose that this right should be in the nature of a “right to bid” rather than a firm right, although there will be cases where Railtrack will not be in a position to offer even a “right to bid” without having first carried out appropriate performance modelling exercises.
- Ancillary movements (paragraph 2.6 of the template) - Part D of the Access Conditions defines “Ancillary Movements” and we therefore question the need for sub-paragraph (c) i.e. “testing” since it is clear, from that definition, that testing is part of an ancillary movement.

In addition, we question whether a movement for “route clearance purposes” is an ancillary movement, particularly in the light of the Regulator’s recent consultation on Vehicle and Route Acceptance procedures where the Regulator is suggesting that access for route acceptance purposes could form part of a separate track access agreement.

- Additional Slots - whilst it is not referred to in the main text of the consultation, we note the inclusion of Table 2.2 and the operative provisions of paragraphs 2.4 and 2.5 of the template.

When the original franchised passenger track access agreements were negotiated, the number of train slots offered to each operator was based generally on the number of services operated by that operator in the 1994/5 timetable. Where an operator indicated an intention to increase services, a number of additional rights were granted in the nature of “additional slots”. Five to six years later, we consider that a template Schedule 5 should not contain any right to additional slots, and that any additional services sought by an operator should be dealt with through arms length negotiation with the operator in question.

- Train length – we would not accept that an operator should have a firm right to operate trains up to the maximum length that the “network can accommodate”. So far as platform capacity is concerned, we believe that the Regulator’s proposal is acceptable. Our ability to timetable trains of particular lengths is not however conditional solely on platform length. There are other issues that would need to be considered including such matters as weight, power draw, braking characteristics and general performance capability. To illustrate this, an HST in 2+7 formation can achieve faster sectional running times than an HST in 2+8 formation. Another example is that Class 47 hauled passenger trains of less than seven vehicles have a “Rule Book” restriction on speed over certain parts of the network. Accordingly clarification is required as to what the Regulator means in this context by “the network can from time to time accommodate”.

2.59 We agree that Railtrack may only exercise its flexing rights “having had due regard to the Decision Criteria.”

Protected rights and obligations

2.60 We note that the Regulator will be consulting on this issue at a later date. In the meantime, the template Schedule 5 contains no reference to the operator having protected rights.

Network code

2.61 We would need much more information and detail, than is provided in this consultation paper, on precisely what parts of an access agreement would, in the Regulator’s terms, migrate to the Network Code once that Code has been established. Without that level of detail, we are unable to comment on the proposals, but would question how the Regulator considers that all of the provisions in relation to track access rights (i.e. Schedule 5) of franchised passenger operators and equivalent (Schedule 3) of freight operators could be contained within a single network code. We consider that this would be a material departure from the current contractual framework and structure, and repeat our need for further detail and clarification regarding these proposals before being able to judge whether or not they would be appropriate for the industry.

Conclusion

2.62 We support the proposal for a standard format for expressing track access rights. However, we believe that items that could reasonably be expected to appear in very few contracts (for example, hard-wired departure times with no flex; designated platforms; minimum turnaround times which are greater than the Rules of the Plan and rights to connection) should not form part of the template, but rather should be left for individual negotiation. We are not convinced that non-common core arrangements lend themselves, readily, to standard form, and being the exception rather than the norm suggest that these should be dealt with through arm’s length negotiation with individual operators and not as part of a “general” template.

3. Change of Rights Over Time

Introduction

- 3.1 We support the proposed provisions for changes to access rights over time, provided there are safeguards to protect our financial position as well as that of the affected train operators. It is in the public interest for network capacity to be used efficiently and any unused capacity to be made available for use by others.
- 3.2 To avoid fossilisation of the timetable, a periodic strategic judgement should be made concerning the use of scarce capacity to consider whether it could be better utilised, and whether a restructuring of the timetable could provide additional capacity more efficiently and economically than by constructing additional rail infrastructure to provide that capacity.
- 3.3 We note that the European Infrastructure Directive requires any access trading to be implemented through the infrastructure manager.
- 3.4 Save where we are the **actual** proposer (for example in the context of a permanent mandatory removal of access rights), in all cases the Regulator would need to ensure that we are held harmless for all costs, losses and expenses (including loss of revenue) which we may incur as a result of any of the processes described in this Chapter. We would expect the Regulator to propose how such neutralisation might be achieved where for example a franchised access right is being replaced by an open access right and the SRA volume incentive only applies to franchised services.

Use it or lose it (Access Condition J11)

- 3.5 In the case of enhancement projects funded by train operators, we see no reason why such rights could not also be subject to a “buy out” provided that the operator was reimbursed for its investment and loss of profit. Whilst recognising that such buy outs would be rare, there appears no reason, in principle, why they should not be the subject of “use it or lose it”. Given the relatively lengthy timescale of the Timetable Development Period, we suggest that a failure to bid for a firm contractual right for a period of **one** year rather than two should be the criteria to be applied in assessing any “failure to use”.
- 3.6 We also support the “90 day” rule where services are entered into a timetable but then not operated. We suggest that, in order to avoid a small number of trains being run by an operator as a blocking tactic to avoid giving up the right, a threshold (expressed perhaps as a number of days within the 90 days or as a percentage of services) should also apply to test whether or not a firm contractual right should be made the subject of a use it or lose it notice. Given that the nature of the freight market is different to the passenger market and certain flows are seasonal,, a different timescale to the 90 days proposed for passenger operators might need to be applied to the giving up of unused freight slots.
- 3.7 Where an operator holds firm contractual rights to service characteristics other than quantum, we believe use it or lose it should apply immediately that right is not exercised. Were an operator to be able to retain unused rights to, for example, hard-wired departure times, we would have to assess applications for new rights

against both the timetable where those rights were not being exercised and a hypothetical timetable where they were. This does not seem to be an efficient or economic way of validating applications for new rights.

Freight operators (Access Condition J12)

3.8 The Regulator's proposals outlined in this section are very similar to those contained in the March 2001 track access agreement with EWS entered into following directions under section 17 of the Act. The Regulator has said that he will only approve future freight agreements containing these provisions, or where a very good reason has been made for not including them. We can see how this should facilitate competition in the freight market, and recognise the balance afforded by the proposals allowing for independent arbitration should there be a "failure to agree".

Voluntary trading of rights (Access Condition J1 to 9)

3.9 We support the voluntary trading proposals. We agree that they should be incorporated into the provisions of the Network Code instead of the individual track access agreements so that the same rules apply to as many train operators (including freight operators) as possible. When Part J comes into effect, it should replace rather than be in addition to Part 8 of Schedule 7 in each of the franchised passenger track access agreements.

3.10 We also believe that it would be appropriate to review the process associated with voluntary trading of rights; this is extremely complicated and not well understood by many of the industry players. We have already provided evidence to the Regulator² that this complexity has been the main reason why this process has not been used in practice – we believe it is in all parties interests to develop a simpler and less cumbersome process.

Temporary surrender of rights (Access Condition J1 to 9)

3.11 We believe that in the context of **voluntary** trading of rights, trading (whether by way of surrender or adjustment) should be available on a temporary basis. Since the trading is **voluntary**, it is not clear what prevents any such trading (by way of adjustment or surrender) being carried out on a temporary basis. Accordingly, we are not currently convinced of the need to incorporate within Part J a "temporary surrender of rights" section.

3.12 As stated in the introduction, it will be important for the Regulator to ensure that we are neutralised from the financial effects of any such trade.

Permanent mandatory removal of rights (Access Condition J10)

3.13 The conditions laid down in paragraph 3.15 of the Regulator's proposals do not appear to have been transposed into the relevant sections of Part J of the Network Code. For instance, J 10.3 is not consistent with the conditions referred to in paragraph 3.15 of the Regulator's proposals.

² Letter to Matthew Cherry on Access Trading dated 6 May 1999

- In respect of the second bullet point in paragraph 3.15 of the Regulator’s document, we believe that the PSR obligation condition need not apply where the SRA has proposed the change and is in a position to adjust the PSR requirements. This does not appear to be catered for in J 10.
 - In respect of the third bullet point in paragraph 3.15 of the Regulator’s document, we are not sure why a distinction is being made between rights which pre-date and those which post–date promulgation of the rules. There may be occasions where, *in extremis*, it may be sensible to adjust rights which pre-date the promulgation of the rules, subject to adequate compensation being provided.
- 3.14 We support the principle of operators being compensated for rights removed, subject to appropriate back to back arrangements being put in place to ensure that we are held harmless by the proposer of the change. We also support the Regulator’s proposals on hard-wired rights, this is precisely why we do not consider, in the context of the Schedule 5 Model Clause exercise, that rights in relation to, say, platforms and departure times should be “hard-wired”. We note that the SRA may apply to us to remove an operator’s rights, but we do not believe that the SRA would be entitled to make such a request if it is not a party to the Access Conditions.
- 3.15 We support the removal of rights in some circumstances in order to improve operational performance on the network, subject to regulatory approval as a safeguard. In such cases the payback to the industry would be in improved performance.
- 3.16 We agree that firm timescales are needed for the necessary track access agreement adjustments, and could work with either of the two processes suggested by the Regulator provided, as previously stated where we are not the **actual** proposer of the removal, we are held neutral under the process. We note the alternative approach in paragraph 3.22 of the Regulator’s document, but any such determination must not place us in breach of any access agreement with a third party operator.
- 3.17 We are not in a position to arbitrate as to who has the best commercial case for retention (or transfer) of rights. Therefore, we would wish a role in the negotiations between the two affected operators, or before an arbitrator, when the permanent reduction notice has been served at the request of another operator or the SRA.

Conclusion

- 3.18 Overall, we believe that the SRA should apply the appropriate public interest criteria to decide between conflicting uses of scarce capacity. For instance, the 80% growth target for freight may require adjustment to passenger rights on routes which are more critical for increased freight services and where such adjustment is more cost effective to the industry than building new infrastructure to provide equivalent extra capacity.
- 3.19 To allow this to happen, we would need to be assured that we are held harmless from this process before embarking on any access right adjustment procedure. We therefore suggest a proviso is added to Part J stating that, where a Train Operator

or the SRA propose a change, then the proposer must agree to underwrite our costs, losses and expenses (including loss of revenue) before we are obliged to take the proposal forward.

3.20 Our further comments on the proposed new Part J accompany and form part of this response.

4. Moderation of Competition

Summary

- 4.1 The generic problem of flow-based protection is that point to point flows do not correspond very well with the markets that the policy is seeking to protect. The proposed policy also ignores the impact of capacity in constraining and preventing market entry. Given the lack of capacity on large parts of the network (particularly those areas where entry might be considered) we believe that capacity, rather than the competition policy, is the largest constraint on entry.
- 4.2 However, our key conclusion is that the ORR proposals for flow-based protection would be:
- difficult to define;
 - ambiguous and complex; and
 - have disproportionately high transactions costs.

The policy effect of introducing the ORR proposals is likely to be “***an insuperable barrier to entry in the great majority of cases***”³ and there are better, simpler ways of achieving the same policy outcomes, which could come into effect a year earlier.

General Approach to Competition Between Operators

- 4.3 In determining the correct approach to promoting or moderating competition between operators, we believe that it is important to be clear about the overall objective of the policy approach. This ranges from complete protection to all existing operators (eliminating all new entry); through promoting generative services (those which primarily grow the market) but protecting incumbents from abstractive services (those which primarily seek to redistribute the share of the existing market); to open competition with no difference between incumbents and entrants in the opportunity to seek access rights and train paths. The appropriateness of any policy proposals to moderate competition need to be tested against their likely outcome along this policy range.
- 4.4 The Regulator has set out a set of **policy instruments** without a clear statement as to his **policy intentions**, this is particularly important as ORR’s section 4 duties in this area are potentially conflicting. As set out in our response to Chapter 5, we believe that the Regulator’s policy proposals would give exactly **the opposite signals** as to where entry should be allowed to what we believe would be his policy aim.
- 4.5 In developing the appropriate framework for moderating the entry of open access operators, it is also important to align the policy with the principles for charging for open access operators. This is particularly important when the ORR’s proposed

³ *Competition for Railway Passenger Services*, ORR, December 1994

mechanism for moderating competition relies on new operators paying compensation to the incumbent in addition to their access charges. Therefore, the effects of the compensation cannot be fully evaluated until the access charges are clarified. We believe that the final conclusions on the policy for moderating competition should be produced at the same time as the final version of the Regulator's criteria for approval of access agreements – a draft version of which the Regulator it would appear is not proposing to publish until the Autumn.

- 4.6 Another key objective of the policy proposals is that they should not introduce disproportionate transactions costs, either in setting up the systems to monitor compliance or in the ongoing management of the policy. They should also not be over complex, so that they are easily understood by industry parties (both existing and prospective) and unambiguous to implement.

Form of Protection

- 4.7 The Regulator is proposing to continue basing protection on specified point to point flows because he believes that it is:

- easy to define;
- reduces ambiguity;
- reduces transactions costs; and
- allows protection to be linked to specified investment projects.

Experience of the previous moderation of competition policy shows that this is incorrect and that there are better, simpler ways of achieving the same policy outcomes.

The Difficulty of Defining Markets

- 4.8 The policy of moderating competition aims to protect the profitable **markets** that the incumbent operator serves, to allow him to cross-subsidise loss-making markets that he has to serve under his franchise agreement with the SRA. The problem is that markets are difficult to define and do not correspond very well with contractual flows. Many of these difficulties were identified in the implementation of Stage 1 and Stage 2 of the existing mechanism, and they include:

Alternative Termini: While an operator may only operate on one specific flow (eg Paddington to Bristol Temple Meads), it may be possible for an entrant to operate over a different flow (eg Paddington to Bristol Parkway) and compete in the same market (in this case London to Bristol). Given the large number of alternative flows that would allow an entrant to compete in the same market (especially originating from London), this makes market protection based on flows much more complex to define and implement than would otherwise be the case.

Exempt Operators: The Regulator does not envisage the arrangements protecting an operator from competition already existing on the network (Para 4.22). In general this will mean that existing operators are exempt from some of the protection enjoyed by other incumbent operators, but they may or may not also be exempt from the alternative termini flow protection (depending on the exact details of the flow). This makes flow-based protection much more complex to define and implement than would otherwise be the case.

Time Limited Protection: Many operators only serve certain flows in peak periods or on weekdays or weekends. The markets that should therefore be protected are over those specific times or on those specific days. This makes any market based protection based on flows more complex to define and implement than would otherwise be the case.

Specific Route Protection: In some cases a station to station flow can be served by routing the trains via two or more alternative routes. One alternative may not in any way compete with the incumbent on the protected flow (perhaps because the journey time is significantly longer and the entrant is seeking to serve all the intermediate flows/markets). Therefore, to allow entry to markets that do not compete with the incumbent, it is necessary to limit the protection to specific routings or stopping patterns. This makes flow-based protection much more complex to define and implement than would otherwise be the case.

Use-it or Lose-it Protection: In some cases an operator serves a flow which another operator might compete on (perhaps by an extension of one of his existing services). It would not be reasonable to prevent entry if the incumbent had withdrawn or reduced his services beyond a certain threshold. Therefore, to allow entry in these circumstances it is necessary to limit protection to where the incumbent continues to operate services. This makes flow-based protection more difficult to define and implement than would otherwise be the case.

Ambiguity and Complexity in the Proposed Mechanism

- 4.9 Ensuring compliance with the current Stage 2 moderation of competition mechanism is an extremely complex process. To check a service with 7 stops requires over 100,000 individual checks to see if it is protected. It is significantly more complicated than the capacity charge tariff and would apply to less than 1% of the revenue recovered by the capacity charge. There are only one or two individuals in the industry who understand the detailed mechanism used in Stage 2. This level of complexity has seriously impacted on the incentive effects that lowering the competitive threshold might otherwise have had. Including compensation calculations and payments for each protected flow would make the policy even more complicated. Given the industry's and Regulator's comments over the level of complexity in the capacity charge tariff, it is clear that the Regulator's moderation of competition proposals would need to be substantially simplified for regulatory consistency.
- 4.10 In addition, the definition of what services are prevented from being operated by flow-based protection is ambiguous over the precise treatment of (for example) pick-up only and set-down only stops, and the definition of a regular scheduled service – how frequently and what level of regularity does a new service need, before it is subject to moderation of completion.

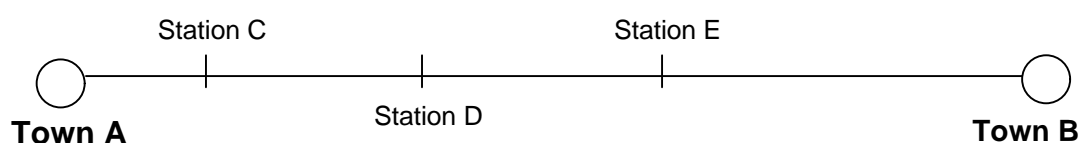
High and Disproportionate Transactions Costs

- 4.11 To develop the system to ensure compliance with the Stage 2 moderation of competition policy cost Railtrack alone around £200,000. Other industry parties, including ORR, also faced significant costs in introducing the regime. For us, this

is substantially more than the contribution above marginal costs that we have received from open access paths that have been allowed under that policy. Other operators have incurred significant costs to introduce an extremely complicated regime with little benefits above those that might have been received from a much simpler regime that had the same policy impact. The current proposals which are for a more complex regime than the Stage 2 mechanism with financial compensation payments that would require auditing and consequential charges to billing systems would impose even higher transactions costs on the industry. We believe that any regulatory impact assessment² would demonstrate that the costs of introducing the Regulator’s proposals far outweighed the benefits.

Preventing non-competing entry

4.12 By not recognising the different nature of the market that the entrant may be seeking to serve, the proposed flow-based mechanism will prevent entry that would not compete in the market the incumbent is seeking to protect. This is illustrated in the example below. An entrant might seek to serve the market for a stopping service between 2 towns which would allow customers to travel between small stations and those towns (for example flows A to C, A to D, C to E, D to B and E to B), while the number of stops and low speed would mean that it did not compete in the market for travel between towns A and B. However, if another operator had protection on the A to B flow, it would prevent the entrant from operating that non-competing service.



Protecting Investment

4.13 The Regulator is proposing to use the same mechanism for protecting an operator’s investment and for protecting an operator from cherry picking. The consultation paper does not comment on whether the aim of the policy is to protect capacity created by the investment (which protecting flows does **not** do) or protecting the market created by the investment.

4.14 We believe that it would be better for the SRA or the individual TOC (where they are funding the enhancement) to propose as part of the negotiation of the enhancement project the level and type of protection that is justified to support the enhancement. This need not be flow-based, but could be tailored to the precise markets and capacity improvements that needed protection and would then be part of the access agreement approved by ORR.

Duration of Protection

² The Better Regulation Task Force recommends that economic regulators should be required to produce assessments of costs and benefits for proposals with a significant impact on business activity.

- 4.15 We believe that the period of protection necessary to protect an individual enhancement project, as well as the type of protection, should be negotiated on a case-by-case basis as part of the negotiation of the enhancement project as set out above.

Access Protection Payment

- 4.16 The Regulator's proposals for access protection payments are similar to the proposal for **access deficit charges** in the previous Regulator's July 1994 consultation document, "*Competition for Railway Passenger Services*". When considering the proposal then, he concluded that:

*"In particular, he is also **not convinced that Access Deficit Charges could readily be calculated on an objectively justifiable basis. Moreover, if levied at the rate of 100% their effect would be likely to create an insuperable barrier to entry in the great majority of cases.**"⁴ (emphasis added).*

- 4.17 This conclusion was supported by a significant volume of analysis into the impact of introducing access deficit charges undertaken by British Rail Operational Research for OPRAF. We have discussed the likely implications of the Regulator's policy proposals with ATOC, and they agreed that the proposals would be likely to prevent virtually all new entry.
- 4.18 The current proposals on the precise definition of the compensation applicable for a protected flow, and how to calculate and validate this for potentially thousands of flows, have yet to be defined by the Regulator. We believe this will be a significant task that will be extremely difficult to achieve on an objectively justifiable basis (particularly with operators introducing dynamic revenue yield management techniques that make it extremely difficult to forecast the potential loss of revenue). In addition, it would be necessary to ensure that the compensation payments could be automatically implemented through Railtrack's billing systems.
- 4.19 Other Regulators (eg OFTEL) have considered introducing access deficit contributions to help fund the universal service obligation and protect against the impact of cherry-picking entry. They have subsequently withdrawn them, since they were seen as overly complicated and it was very difficult to quantify the necessary level of ADC.

Alternative Policy Options

- 4.20 Only one set of access rights (Hull Trains) has been granted under the current moderation of competition regime. As well as satisfying the moderation of competition regime requirements, this request required a detailed hearing into the public interest issues associated with granting the rights. It should be noted that

⁴ *Competition for Railway Passenger Services*, ORR, December 1994

Hull Trains would have been very unlikely to have been able to afford the additional costs of the suggested compensation payments.

- 4.21 Given that the Regulator's proposals would effectively eliminate new entry, it would be much simpler to directly control and moderate competition through ORR issuing a statement to that effect; this could be backed by a comfort letter from SRA to the franchised TOCs, making it clear that part of the Memorandum of Understanding between SRA and ORR included an understanding that the Regulator's policy on moderating competition would continue for a specified time-period.
- 4.22 Such a policy could be implemented through ORR publishing criteria similar to "*New Service Opportunities for Passengers, A Policy Statement*", March 1998, and these criteria could also assist in clarifying ORR's approach to granting new access rights. Such a policy could be implemented without any need for nomination and validation of large numbers of flow based calculations. It would include criteria for evaluating new services on a case-by-case basis (as in effect the current mechanism has been) and would be clear on the Regulator's attitude to abstractive entry and entry that might undermine the business case for existing or future investment projects.
- 4.23 An alternative, but more complicated, option would be to consider adjusting the passenger revenue allocation system (ORCATS) to ensure that entrants do not receive a large revenue allocation on abstractive flows. This would allow much closer alignment of the protection to the market. For example, a train operator operating a stopping service between two towns, the direct flow between which was protected, might not receive any revenue allocation on that flow, but would still be able to serve all the markets for travel between smaller stations and the towns. Similarly, protecting particular time-periods / days and implementing set-down only or pick-up only restrictions is more readily achieved through adjusting revenue allocation than restricting the granting of access rights.

5. Methodologies for Compensation

- 5.1 As we have set out in our response to Chapter 4 above, we do not believe that a flow-based mechanism with automatic compensation payments is the best way to implement the Regulator's moderation of competition policy aims. Our comments on the various options for compensation are therefore to be taken in the light of this general policy position.

Negotiating individual compensation payments

- 5.2 We do not support the alternative option presented in paragraph 5.8 of the Regulator's proposals of negotiating individual compensation payments for potentially thousands of flows with individual operators. This would involve huge and disproportionate transactions costs for a policy that could be implemented in a much simpler and less costly manner.

Calculating the compensation in different ways

- 5.3 Railtrack believes that the industry should not be seeking to incur even higher transactions costs in setting up the moderation of competition regime and significantly more complexity through having different ways of calculating the compensation as suggested in paragraph 5.9 of the Regulator's document.

Compensation based on average revenue foregone

- 5.4 The Regulator is proposing basing pre-set compensation on the lost profit based on the **average** revenue reduction for the incumbent's services were it to increase incrementally – the entrant's service pattern would not be taken into account. However the **actual** revenue foregone by the operator depends crucially on the entrant's actions.
- 5.5 Were the entrant to seek to grow the market through new or differentiated services to passengers, the cost of covering the incumbent's compensation payment would be likely to make this type of service financially unviable. In this case, the passenger would not receive the benefits of the new service even if, in practice, its effects on the incumbent were small.
- 5.6 However, were the entrant to engage in pure abstracting behaviour (for example running services 1 minute in front of the incumbent's services), it would be possible to poach significantly more than the average revenue. In fact, **abstractive entry is likely to be the only type of entry that would be able to afford the very high revenue hurdle that the compensation payments would require.**
- 5.7 We therefore believe that the Regulator's policy proposals give exactly **the opposite signals** as to where entry should be allowed and encouraged to what we believe should be his policy aims.

6. Implementation

Access protection payments and compensation for removable rights

- 6.1 If we are to manage the system of making applications to remove operators rights, we would need to be allowed to recover the costs of setting up and managing the system to ensure that the overall financial effect on us of these proposals is neutral. In addition, for us to have the correct incentives to facilitate adjustment of rights where it is in the customers and funders best interests, we would need to receive a volume incentive for open access rights consistent with that received for franchised passenger and freight rights.

The Implementation Timetable

- 6.2 As stated in our response to Chapter 5, the policy for moderating entry of open access operators should be aligned with the development of principles for charging for that access. The final conclusions on the Regulator's policy on this issue should therefore be produced at the same time as the final version of the Regulator's criteria for approval of access agreements.
- 6.3 Under the timetable proposed by the Regulator, the approval of flows for protection from the end of the interim period would only be completed by Summer 2002. This is therefore likely to miss the Summer 2002 timetable conference. If this is correct, the policy will only be able to inform requests for new rights that are bid into the Summer 2004 timetable (based on the Summer 2003 timetable conference). A simpler alternative (such as publication of regulatory criteria) that did not require a long process to nominate and approve flows for protection could come into effect a year earlier in the Summer 2003 timetable.

Appendix A – Chapter 2: Make Up Of Working Timetable Journey Time

Components of Journey Time	Change Process
<p>1. SRTs – these are contained within the Rules of the Plan and are calculated by reference to the line speed profile of the railway infrastructure and the performance characteristics of a given train. This is based on an objective computer simulated test reflecting the capabilities of the infrastructure and rolling stock and would only be adjusted if the capability or characteristics of either the infrastructure or rolling stock change.</p> <p>In some instances, an additional “adjustment factor” is added to reflect speed differentials where lines converge. These adjustments are also documented in the Rules of the Plan.</p>	<p>As with any other aspect of Rules of the Plan, any changes would need to go through the consultation, and appeal, process laid down in Part D of the Access Conditions. In other words, as Part D currently stands it is not open to any industry participant to unilaterally impose or require changes to the Rules of the Plan.</p> <p>In addition, changes to the infrastructure are likely to need to go through the consultation (and appeal) process laid down in Part G of the Access Conditions (Network Change) which also contains the operators’ entitlement to compensation. Similarly, changes to rolling stock are likely to be subject to Part F (Vehicle Change) of the Access Conditions, which contains similar provisions for consultation, appeal and compensation.</p>
<p>2. Station Dwell Times – these are contained within the Rules of the Plan and are based on the agreed time that, in normal circumstances, it takes a train to arrive at and depart from a station allowing, amongst other things, for its passengers to embark and disembark.</p>	<p>As with any other aspect of Rules of the Plan, any changes would need to go through the consultation, and appeal, process laid down in Part D of the Access Conditions. In other words, as Part D currently stands it is not open to any industry participant to unilaterally impose or require changes to the Rules of the Plan.</p>
<p>3. Engineering Recovery Allowances – these are contained within the Rules of the Plan. They are inserted to provide for the planned impact of temporary speed restrictions resulting from engineering work.</p>	<p>As with any other aspect of Rules of the Plan, any changes would need to go through the consultation, and appeal, process laid down in Part D of the Access Conditions. In other words, as Part D currently stands it is not open to any industry participant to unilaterally impose or require changes to the Rules of the Plan.</p>

<p>4. Performance Allowance - this is contained in the Rules of the Plan and is an amount which ensures that the timetable is able to be operated with an appropriate degree of robustness</p>	<p>As with any other aspect of Rules of the Plan, any changes would need to go through the consultation, and appeal, process laid down in Part D of the Access Conditions. In other words, as Part D currently stands it is not open to any industry participant to unilaterally impose or require changes to the Rules of the Plan.</p>
<p>5. Pathing Time - although not contained within either ROR/ROP, pathing time is only inserted into a train slot as a result of one or more operators requiring train slots which, without the insertion of pathing time, would conflict with the Rules of the Plan. Examples of this would include conflict with Rules of the Plan headways or junction margins</p>	<p>Not applicable, but we can only insert pathing time in accordance with Part D of the Access Conditions, and in particular the Decision Criteria (although clearly operators which have firm contractual rights will take priority). If operators disagree with our application of the Decision Criteria they have a right of appeal, ultimately to the Regulator under the Timetable Appeal Procedure set out in Condition D5.</p>